Seven Seventeen HB Denver Corporation, d/b/a Adam's Mark Hotel and International Union of Operating Engineers, Local 1. Case 27–CA– 13800

March 31, 1998

DECISION AND ORDER

By Chairman Gould and Members Liebman and Brame

On October 30, 1996, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions, a supporting brief, an answering brief, and a reply brief. The General Counsel filed exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Seven Seventeen HB Denver Corporation, d/b/a Adam's Mark Hotel, Denver, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent excepts to the judge's decision, asserting that it evidences bias and prejudice. On our full consideration of the entire record in this proceeding, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias against the Respondent in his analysis and discussion of the evidence.

The judge found, and we agree, that the Respondent did not violate Sec. 8(a)(3) and (1) of the Act by refusing to hire employee Robert Schlauder. We specifically rely on the judge's crediting of the testimony of the Respondent's agent, William Gabel, that he did not recommend Schlauder for hire because Schlauder had demonstrated a poor attitude toward his department managers. We find, in agreement with the judge, that the Respondent satisfied its burden of proving that it would have refused to hire Schlauder even in the absence of his protected activities. Therefore, we find it unnecessary to pass on the judge's further findings that Schlauder's conduct during his job interview was not protected by the Act and that it was lawful for the Respondent to additionally rely on that conduct in refusing to hire him.

Wanda Pate Jones and Irene H. Botero, Esqs., for the General Counsel.

Brad Hiles and Timothy Sarsfield (Peper, Martin, Jensen, Maichel & Hetlage), of St. Louis, Missouri, for the Respondent.

Walter Brauer, Esq. (Brauer, Buescher, Valentine, Goldhammer & Kelman), of Denver, Colorado, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Denver, Colorado, on April 22-26, 1996. On May 8, 1995, International Union of Operating Engineers, Local 1 (the Union) filed the charge alleging that Seven Seventeen HB Denver Corporation, d/b/a Adam's Mark Hotel (Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). The Union filed an amended charge on August 2, 1995. On June 22, 1995, the Regional Director for Region 27 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5), (3), and (1) of the Act. On April 3, 1996, the Regional Director issued an amended consolidated complaint. On April 21, 1996, the Regional Director withdrew the 8(a)(5) allegations of the amended complaint. Respondent filed timely answers to the complaints, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following:

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a Colorado corporation with a principal place of business in Denver, Colorado, where it has been engaged in the operation of a hotel. Respondent annually derives gross revenues in excess of \$500,000 and purchases and receives goods and materials valued in excess of \$5000 from outside the State of Colorado. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

¹ On June 3, 1996, counsel for the General Counsel filed a motion to correct the transcript. As the motion is unopposed, I grant the motion and incorporate the corrections as ALJ Exh. 1.

²The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of believe.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

Respondent has operated the Adam's Mark Hotel in Denver, Colorado, since January 10, 1995. The hotel had previously been operated as a Radisson Hotel under different owners and operators. Prior to the purchase of the hotel by Respondent, the Union had represented the maintenance and stationary engineers in the Radisson's engineering department. Respondent refers to this department as its building services department. There were 10 maintenance engineers and 5 stationary engineers represented by the Union at the time the hotel was purchased by Respondent. While all 15 employees applied for employment with Respondent, Respondent hired only 3 of the former Radisson engineers.

In this case, the General Counsel alleges that Respondent failed and refused to hire 12 employees because "the employees were members of or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities and in an attempt to avoid becoming a successor to the Radisson."3 The complaint also includes allegations that Respondent coercively interrogated employees during preemployment interviews. Respondent denies the commission of any unfair labor practices. Further, Respondent contends that these employees were not denied employment due to union animus but rather because Respondent viewed the Radisson's engineering department with distrust. During the hearing, the General Counsel amended the complaint to include the allegation that Respondent failed to hire A. J. Hamlin, one of the 12 alleged discriminatees, because a charge had been filed by the Union against Respondent.

During the hearing, Respondent moved for dismissal of the 8(a)(1) allegations of unlawful interrogation and to dismiss specific employees' 8(a)(3) claims. I deferred ruling on that motion until after the conclusion of the hearing.

B. The Section 10 Issues

The amended complaint alleged Respondent refused to hire former employees of the Radisson Hotel who were members of or in support of the Union to avoid becoming a successor of the Radisson Hotel. The complaint set forth a list of 12 names of employees who Respondent refused to hire on about January 10, 1995. Further, the complaint alleged Respondent violated the Act by interrogating employees in preemployment interviews from January to May about their sentiment and support of the Union.

The amended charge, which the General Counsel and the Union contend supports the complaint, stated that since January 10, the Respondent "refused to hire former employees of the Radisson Hotel because of their membership in and support of Operating Engineers Local 1, including" a list of 11 employees. "The Employer refused to hire these persons in order to avoid recognizing and bargaining with . . . Local

1 . . . But for the Employer's unfair labor practice . . . the Union would have represented a majority of employees . . ." and thus the Respondent has a duty to bargain with the Union. The original charge only stated that since January 10, Respondent "refused to hire former employees of Radisson Hotel and members of . . . Local 1 because of their membership and support of Local 1." The original charge did not specifically state the names of any employee which the Respondent failed to hire. Neither the original nor the amended charge alleged that Respondent unlawfully interrogated employees in preemployment interviews.

Respondent contended in its posttrial brief that the failure of the original charge to identify the specific discriminatees and the date the discrimination occurred requires that it be dismissed on the ground of substantially deficient pleadings. This would cause several of the allegations in the complaint to be time-barred by Section 10(b) of the Act.

Section 10(b) of the Act provides in part, "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge." Section 102.12(d) of the Board's Rules and Regulations states the charge shall contain "[a] clear and concise statement of the facts constituting the alleged unfair labor practices." The general allegations in the charge "may be later supplemented or amplified by more specific allegations. These 'relate back' to the date the charge was filed." North America Rockwell Corp. v. NLRB, 389 F.2d 866, 870 (1968); NLRB v. Gaynor News Co., 197 F.2d 719, 721 (2d Cir. 1952). In Stop N' Go Inc., 279 NLRB 344 (1986), the Respondent alleged the original charge was materially deficient as it failed to name the proper parties, business enterprise and important dates. The Board, in adopting the administrative law judge's decision, denied the motion to dismiss as without merit since the amended charge specifically set forth the same unit, same discriminatees and the general nature of the unfair labor practice violations that were relied upon in the complaint.

In this case, the original charge gave an approximate date of when the discriminatory acts began but did not list the names of the individuals discriminated against. The original charge merely stated that union members were not being hired by Respondent. The amended charge alleged the date in which the employer initially refused to hire former employees of the Radisson Hotel and gave a list of the employees who were discriminated against. The same dates and substantially the same discriminatees are alleged in the complaint. Thus, the more specific allegations in the amended charge gave Respondent adequate notice of the alleged unfair labor practices.

Next, I address Respondent's argument that the complaint allegations of interrogation are not supported by a charge. As stated by the United States Supreme Court in *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959), the Board is not barred from citing in a complaint "unfair labor practices which are related to those alleged in the charge and grow out of them while the proceeding is pending before the Board." However, the Board does not have "carte blanche to expand the charge as [it may] please, or ignore it altogether." Id. at 309. The charge must form the basis of the complaint because Section 10(b) states a requirement that the Board "not originate complaints on its own initiative." *G. W. Galloway Co. v. NLRB*, 856 F.2d 275, 280 (D.C. Cir. 1988). In *Galloway* the United States Court of Appeals for the District of

³ The allegation that Respondent unlawfully refused to recognize and bargain with the Union in violation of Sec. 8(a)(5) was withdrawn prior to the opening of the hearing. Originally the complaint included allegations that Respondent refused to recognize and bargain with Hotel & Restaurant Employees and Bartenders Local Union #14. Those charges were also withdrawn prior to the opening of the hearing.

Columbia held that the Board had exceeded its authority when it issued a complaint alleging that an employer had threatened to terminate employees picketing in front of its plant, whereas the underlying charge had alleged only that the employer discharged an employee for engaging in protected concerted activity.

In Nickles Bakery, 296 NLRB 927 (1989), the Board adopted the reasoning of Galloway and reaffirmed the threepart test advanced in Redd-I, Inc., 290 NLRB 1115 (1988), to determine whether the allegations of a complaint are sufficiently related to the allegations of the underlying charge. The test requires an analysis of whether: (1) the allegations involve the same legal theory as the allegations of the charge; (2) the allegations arise from the same factual circumstances or sequence of events; and (3) a respondent would raise similar defenses to both allegations. In Lotus Suites, Inc. v. NLRB, 32 F.3d 588 (D.C. Cir. 1994), the Circuit Court held that an unfair labor practice charge which contained boiler plate language, but stated no facts, could not possibly meet the Nickles Bakery standard. As the Court stated, where the charge contains no factual allegations at all, there can be no nexus and a complaint cannot be issued.

Applying the Redd-I closely related analysis, to the circumstances of this case, the 8(a)(1) allegations are closely related to the timely charges to permit their inclusion in the complaint. First, the 8(a)(3) failure to hire allegations in the timely filed charges are related to the same legal theory as the otherwise untimely 8(a)(1) allegations of unlawful interrogation. The alleged interrogations and failure to hire were a part of the Respondent's alleged overall scheme not to hire persons who were members of or in support of the Union in an attempt to avoid becoming a successor to the predecessor employer. The interrogation was the first step of Respondent's alleged illegal hiring pattern in its attempt to rid the hotel of employees who supported the Union. Second, the unlawful interrogation claim arose from the same factual situation or sequence of events as the timely allegations. The preemployment interviews and the decision not to hire prounion employees were all a part of the initial hiring process which occurred in the months surrounding the Respondent's January 10 takeover. Third, to defend the refusal to hire allegations, Respondent would have to defend the evidence presented by the General Counsel regarding the preemployment interviews. Thus, the 8(a)(1) allegations are closely related to the timely filed charges so that Respondent had adequate notice of the allegations.

Respondent claims the 8(a)(3) and (1) allegations regarding the failure to hire Jonathan Fawkes and Mike Walker should be dismissed because they were not specifically named as discriminatees until the second amended complaint.

An employer charged with an unfair labor practice is not prejudiced in his preparation of a case nor misled as to what he was being charged with when the complaint included employees who were not previously named but in the same class as those employees named in the underlying charge. *NLRB v. Gaynor News Co.*, 197 F.2d 719, 721 (2d Cir. 1952).

Respondent was given adequate notice that it was being charged with the failure to hire the class of employees who were in support of the Union. The charge clearly alleged that during the initial hiring process Respondent failed to hire prounion employees. The amended complaint alleged Fawkes

and Walker were within that class of employees. Adding the names of Fawkes and Walker to the complaint did not present a new legal theory which prejudiced Respondent's preparation of the case, but merely added to the existing class of employees allegedly discriminated against. Thus, the charge gave Respondent adequate notice of the allegations of a discriminatory failure or refusal to hire prounion employees previously employed by the Radisson Hotel. Accordingly, Respondent's motion to dismiss portions of the complaint on 10(b) grounds is denied.

C. The Facts

1. The evidence of motive

The Union represented stationary and maintenance employees at the Radisson Hotel for approximately 30 years prior to Respondent's purchase of the hotel. On January 10, Respondent purchased the assets of the Radisson Hotel from the Omicron Corporation. The most recent collective-bargaining agreement between the Union and the hotel was effective for January 2, 1992, to January 1, 1995. The agreement was extended to January 10, 1995.

In September 1994, Respondent signed a purchase agreement to buy the hotel. The purchase agreement provided that Respondent would have access to Radisson personnel files during the due diligence period and for a period after the sale.

In late October or early November, Respondent set up a temporary office at the hotel. On or about November 8, 1994, the Radisson Hotel notified the Union that the hotel was expected to be sold effective January 10, 1995. Thereafter on December 18, Respondent began advertising for positions at the hotel, including positions for stationary engineers⁴ and maintenance engineers. The next day, Janet Waites, Respondent's associate director of personnel, arrived at the hotel with a team of managers from around the country to interview job applicants.

In mid-November 1994, William Gabel, corporate engineering director for Respondent's parent corporation, asked Edwin Marshall, then chief engineer for the Radisson Hotel, for recommendations of Radisson employees for Respondent's building services department. Specifically, Gabel asked Marshall, if Marshall were in a transfer or promotion situation, which employees he would hire to work at the hotel. Marshall, at that time, was a candidate for employment with Respondent as director of its building services department at the hotel. Marshall prepared a list of employees which included his assistant Tommy Pittman, and the names of employees Ralph Castro, Nick Fawkes, Jerry Manion, Frank Pinkett, Nick Swensen, William Waltermire, and Mark Zarlengo.⁵ According to Marshall, whom I credit,⁶ Gabel re-

⁴Stationary engineers are employees licensed to operate the hotel's boilers. They are also called watch engineers and boiler operators.

⁵Zarlengo was an electrician and in a separate bargaining unit represented by IBEW Local 111. Gabel recommended Zarlengo for hire but Respondent did not hire him.

⁶Marshall testified in a candid and straightforward manner. Further, Marshall was a disinterested witnesses in this proceeding. There was no connection with the Union and no animus towards the Respondent. I also found Gabel to be a credible witness. Even at trial, when Respondent's failure to hire certain employees was at issue, Gabel candidly testified that he would hire certain of the alleged

marked that Manion was too heavily involved with the Union. Marshall further testified that Gabel said Zarlengo would not make the list because he was the union steward. Gabel stated that he didn't believe that the engineering employees should work in a union situation. Gabel told Marshall that Respondent hoped to operate the hotel nonunion.

Marshall further testified that approximately 2 weeks later Gabel asked him for the names of stationary engineers or watch engineers who were not likely to be strong supporters of the Union. Marshall gave Gabel the names of two employees Bill Waltermire and Nick Swensen. These two employees were the least senior watch engineers and Marshall believed them to be the least active union supporters.

Respondent did not hire Marshall but instead hired Larry Goldberg as its director of building services. Goldberg began working for Respondent on January 9. On his first day on the job, Goldberg met with William L'Hommedieu, Respondent's corporate director of human resources, and was told that Respondent would be taking over the hotel the next day and that the Radisson employees would be terminated. Goldberg testified that L'Hommedieu told him that if Respondent hired only a minimal number of Radisson employees, Respondent would not have to honor the union contract which had been extended to January 10.7 L'Hommedieu told Goldberg that Respondent was attempting to avoid both the Operating Engineers and Hotel and Restaurant Employees unions. According to Goldberg, L'Hommedieu stated that Respondent had interviewed the maintenance employees and retained only the least prounion employees. Goldberg further testified that he was told that same day by one of his superiors, he could not remember which, that he could not hire any recently terminated Radisson employees. The main reason given to Goldberg was the Union. Goldberg was told by Stan Soroka, general manager of the hotel, at more than one supervisors' meeting, that Respondent wanted to keep the employees happy to keep the unions out.

During the next 4 months, prior to his discharge in May 1995, Goldberg recommended the hire of between 10 to 15 employees. However, based upon what he had been told by his superiors, Goldberg did not recommend the hire of any former Radisson employees employed at the time of Respondent's purchase of the hotel. Goldberg did recommend the hire of former Radisson employees that were no longer working at the time of the takeover. Three such employees were hired. In April 1995, Goldberg attempted to hire a former Radisson maintenance employee and was told by Soroka that he could not do so because the employee might be prounion. Goldberg further testified that he was never told

that former Radisson employees could not be hired because of the fear of vandalism or theft. Goldberg testified that the only thing he had been told about the condition of the hotel was that the previous management of the hotel had not spent money on maintenance and that the hotel had fallen into disrepair.

2. The alleged interrogation of employees

The alleged discriminatees were not interviewed until January 4 and 5, 1995. The employees were interviewed by Gabel and in a second interview by William L'Hommedieu, corporate director of human resources, and Jack Tidd, corporate engineer, together. Of the 15 engineering employees employed by Radisson at the time of the sale, Respondent hired only 3. Respondent hired Swensen and Waltermire, two stationary engineers, and Ralph Castro, a maintenance engineer.

Employee Richard Romero testified that during his interview with Gabel, Gabel asked whether Romero was a member of the Union and how long Romero had been in the Union. Romero answered that he had been in the Union since he began working at the Radisson. Romero had been working at the property for 23 years.

Gabel testified that he did not ask Romero or anyone about their union affiliation. I credit Gabel's denial. Gabel knew that these employees were union members and had Romero's job application in front of him. Further, Gabel did not want to discuss the Union with applicants and attempted to evade questions about the Union.

Employee Dwight Barela testified that in a subsequent interview in February 1995 he was asked by an employee in personnel whether he was in the Union.⁸ Circumstantial evidence indicates that the interview was in March and that the interviewer was a Louis Doque from Respondent's personnel department. Barela told Doque that he was in the Union.

A. J. Hamlin, a stationary engineer, testified that in his January interview, Gabel asked Hamlin what local he was in and Hamlin answered Local 1. Here again, I credit Gabel's denial. There was no reason for Gabel to ask such a question. He knew Hamlin was in Local 1 and did not want to discuss the Union. I find it highly unlikely that Gabel would question an employee about the Union.

In May, A. J. Hamlin went to see Joseph Plant, currently Respondent's director of building services and then Respondent's plant manager, about a temporary opening as a boiler operator. Plant told Hamlin that one of the stationary engineers had been in a motorcycle accident and that Plant did not know if the employee was going to return to work. Plant told Hamlin that the temporary position could turn into a permanent position. Plant told Hamlin to fill out a job application in the personnel office and to seek a wage of \$14 per hour. Hamlin said he had recently filed an application. Plant said he would call the personnel office. After calling personnel, Plant told Hamlin to fill out another application. Hamlin filled out another application and turned it into the personnel

discriminatees. On the other hand, Gabel had reason to shade his testimony to accommodate Respondent's defense. As to these two witnesses, I find Marshall to be a more credible witness.

⁷ Goldberg was shown to have substantial animosity towards Respondent stemming from the termination of his employment. However, I found him to be a more credible witness than Stan Soroka, general manager of the hotel and L'Hommedieu. Further, I find his testimony consistent with other objective evidence. Moreover, Goldberg made these allegations against Respondent's supervisors in a letter to Respondent's owner immediately upon being discharged and prior to any knowledge of this case. In a letter dated May 4, 1995, to Fred Kummer, Respondent's owner, Goldberg stated that he was informed that he "could not hire certain applicants because they might be pro-union."

⁸The record shows that in addition to his interview in January 1995, Barela was interviewed on February 3 by an interviewer named Beth and on March 15 by an employee named Louis Doque. Both Beth and Doque recommended Barela for hire.

⁹In addition to his original application, Hamlin filed applications on January 27, March 13, and May 9.

office. Plant told Hamlin to call the personnel office the next day. Hamlin called personnel for the next few days. After not being able to reach Janet Waites, Respondent's associate director of personnel, Hamlin, called Plant. Plant said that Roger, presumably Roger Rosas, Respondent's personnel director, told Waites not to hire Hamlin. Plant then said he would speak with Rosas. Plant, asked whether Hamlin was still in the Union. Hamlin replied that he didn't know whether he was still a union member. Plant, asked whether Hamlin was willing to change his hair style. Hamlin responded, "Hey man, I know what it is all about. It is all about the Union." Plant responded, "Well I can't say anything about that because I might lose my job."

Plant, currently Respondent's director of building services, testified that after recommending that Hamlin be hired, he learned during a meeting with Soroka and Roger Rosas, personnel director, on May 16, that Hamlin would not be hired as stationary engineer or boiler operator. Plant admitted that during the meeting, Soroka read aloud from a "letter" (most likely the charge which had been filed on May 8) which made allegations that Respondent was discriminating against employees because they were members of the Union. Plant testified that he inferred from Soroka's reading of the letter that Hamlin would not be hired. When asked on cross-examination whether the unfair labor practice charge was the reason that former Radisson employees were not hired, Plant nodded affirmatively. Plant testified that Soroka did not mention that the former Radisson employees were untrustworthy, or that Hamlin could not be hired because of theft problems. On redirect Plant was asked, "So [Soroka] didn't say anything about we are not hiring [Hamlin] because of the charge or because of the union?" Plant answered no. I do not credit this denial. I find that Plant was simply giving what he believed to be the correct answer to a leading and suggestive question from his employer's counsel. I find his earlier testimony to be more reliable. I further note that neither Soroka nor Rosas attempted to explain or deny Plant's testimony.

3. Respondent's defenses

Respondent alleges that it did not hire the former employees of the Radisson because it viewed the Radisson's engineering department with distrust. It contends that this distrust was caused by the poor physical condition of the hotel and by damming statements of Radisson managers about the engineering department.

Without a doubt, at the time of Respondent's purchase of the Radisson hotel, the hotel was in a state of disrepair. This fact was established by the testimony of Marshall and Goldberg as well as Respondent's witnesses. In fact, Marshall had been brought in to replace Leo Wasserman as the chief of the Radisson's engineering department in an attempt to improve what was regarded as an inferior department. Marshall testified that he had made some progress but had not had sufficient time to complete the task. Marshall further testified that the hotel's poor condition was, in large measure, due to the Radisson's refusal to spend sufficient funds for the upkeep of the building. Respondent's witnesses, on the other hand, testified that the Radisson had spent large sums of money on maintenance. Further, these witnesses pointed out

several areas of maintenance that could have been improved with little expense.

Respondent's corporate parent operates approximately 14 hotels across the country. When Respondent purchases a hotel, the employees of the old employer are all terminated. Respondent then hires from new applicants and employees of the former owner. This procedure was followed in Denver. The Radisson terminated all its employees and the former employees were invited to apply for employment with Respondent. When Respondent purchased this facility it did so with the intent of refurbishing and expanding the hotel. Respondent estimates that its final investment in the hotel will be approximately \$130 million.

According to L'Hommedieu, he asked Henning Svendson, general manager of the Radisson, what Svendson would do if he were staffing the hotel from scratch. According to L'Hommedieu, Svendson answered that he would start with a clean slate. Svendson indicated that the employees' performance was sub-par and that the crew was uncooperative and had poor attitudes. L'Hommedieu testified that he was told that the crew was prone to vandalism and theft. Svendson singled out two areas as being disaster areas; building services and banquets. According to L'Hommedieu, Svendson offered favorable recommendations on only two employees, Frank Pinkett and Ralph Castro. Further, L'Hommedieu testified that Svendson specifically stated that he would not hire Jerry Manion and Ed Romero. In the banquet department, Svendson recommended that Respondent not hire any of the full-time servers. Respondent followed Svendson's advice and did not hire any of those banquet employees. These negative comments from Svendson about the engineering department were reported back to Fred Kummer, Respondent's owner, by L'Hommedieu and Tony Piringer, president of Respondent's parent corporation. Kummer said the normal hiring process should be used. Kummer also put in a good word for Ralph Castro, a maintenance engineer. Kummer told L'Hommedieu not to hire anyone unless L'Hommedieu was absolutely sure that an employee could be trusted.

Svendson was not called as a witness. In spite of L'Hommedieu's testimony that he was an incessant note-taker, Respondent produced no notes or memorandum to corroborate L'Hommedieu's testimony. I find it highly unlikely that if events occurred as testified to by L'Hommedieu and Respondent's other witnesses, that there would not be memoranda of such events or conversations. 11 At one point L'Hommedieu testified that he lost his notes and then later testified that he probably threw them out when he no longer needed them. I need not and do not credit such testimony.

Respondent's witnesses also testified that they received negative comments about the Radisson building services department from George Stathos, assistant general manager for the Radisson. According to L'Hommedieu, Stathos rec-

¹⁰ Wasserman was hired by Respondent's corporate parent to work for a construction department at the hotel.

¹¹I find L'Hommedieu's testimony to be a convenient excuse for the failure to hire Manion and Romero. L'Hommedieu had heard Marshall testify that Marshall had recommended Manion and Romero for hire. Further, as will be seen below, Gabel had recommended the hire of both employees. L'Hommedieu admitted that he had not told Gabel and Tidd that Svendson had warned him about Romero and Manion. Piringer did not corroborate L'Hommedieu's testimony on this point. Most important, L'Hommedieu did not include this alleged fact in his pretrial affidavit.

ommended to Respondent that it delay announcing its hiring decisions to the last possible moment, so as to avoid possible vandalism and sabotage.

It is undisputed that Marshall was hired to clean up the engineering department of the Radisson. Marshall took steps to discipline and dismiss problem employees. He told Respondent's officials that he had made progress in the department but needed more time to improve the department and improve the condition of the hotel. Marshall informed Respondent's officials that one reason for the poor condition of the hotel was the Radisson's reluctance to spend money on repairs. Respondent's officials testified that they did not accept that explanation. Fred Kummer, Respondent's owner, testified that he had reviewed the Radisson's expenses and he believed that the hotel had spent considerable sums on repair and maintenance. Further, Kummer believed that many items of disrepair were not costly and were simply a result of neglect. Soroka testified that he believed that blaming the neglect on a limited budget, was simply an excuse for poor management. Stathos and Marshall both stated to Respondent's managers that the Radisson employees were specialists and would resist the generalist approach of Respondent.

During December 1994, the hotel began advertising for employees in local newspapers. Simultaneously, L'Hommedieu met with Radisson employees, from all departments, and encouraged them to apply for work with Respondent.

For hiring in its building services department, Respondent had the applicants interviewed by Bill Gabel, Jack Tidd, and William L'Hommedieu. The employees were interviewed by Gabel and then by Tidd and L'Hommedieu, together. All three interviewers had to agree before an applicant could be hired. If one of the three interviewers did not agree, an applicant could not be hired. The only three employees who could get through this system were Ralph Castro, Bill Waltermire, and Nick Swensen.

When Respondent began operating the hotel on January 10, 1995, the hotel had only 50 percent of its staffing requirements. This was true in the building services department as well as the other departments of the hotel. The announcements of hiring decisions were delayed until the last few days prior to the takeover. The building services employees were the last to be notified of the hiring decisions based on recommendations of Stathos and Marshall that such action would minimize possible vandalism.

After the hotel assumed operations, hiring continued. Respondent advertised in both Denver newspapers for employees in all departments for a period of several months. According to Respondent, employees from the Radisson who had applied for employment and were not hired were not considered for employment. However, former Radisson employees who had left the Radisson's employ prior to the takeover were considered for employment. Respondent hired three employees who had worked for the Radisson in building services but whose employment had terminated prior to the takeover. It apparently did not occur to Respondent, until it experienced a rash of theft and vandalism, that it may have hired some of the problem employees Marshall had terminated. According to Respondent, it was then decided that former Radisson employees would not be hired. One of the former Radisson employees was caught with property stolen from the hotel in the fall of 1995.

I next turn my attention to Respondent's specific reasons for the failure to hire the employees at issue. Employee Dwight Barela worked at the hotel under its various owners since January 1983. At the time of the takeover, Barela worked as a maintenance engineer on the 3:30 p.m. to midnight shift. Barela was interviewed by Gabel. During the interview, Gabel told Barela that Barela would have to perform some electrical work in addition to the maintenance he performed for the Radisson. Barela indicated that he would have no problem doing such work. Barela asked Gabel if any of Respondent's hotels were unionized and Gabel answered that none were. L'Hommedieu testified that Barela was not hired because "his total skill set was not what we were looking for, not up to the standard we needed." L'Hommedieu could not remember Tidd's comments but testified, based on Tidd's written evaluation form, that Barela's skills were focused on minor and cosmetic maintenance. Tidd's written comment states, "limited experience in plumbing, casual cosmetic repairs. 3 to 11 shift almost mandatory due to father and children. No special training."12

Apparently, the interview evaluation form used by Gabel could not be found. Gabel could not recall interviewing Barela and was unable to testify as to why Barela was not hired. As indicated above, Tidd did not testify. Although Tidd's comments on the interview evaluation form mention Barela's preference for the 3 to 11 shift, Barela applied for work on any shift. One of Respondent's supervisors wrote on the corner of Barela's application, "dependable, reliable, independent worker." Barela was not hired and applied for work with Respondent an additional three times. A sindicated above, Barela testified that in a subsequent interview in March 1995 he was asked by an employee in personnel whether he was in the Union. Barela answered that he was.

Employee Jonathan "Nick" Fawkes worked for the Radisson from October 1994 to the takeover. Fawkes had transferred from another Radisson property. Fawkes interviewed with Gabel on January 4, and was rated by Gabel as 'Above Average.' Gabel noted that Fawkes had maintenance skills in the kitchen, laundry and refrigeration areas of the hotel. Moreover, Gabel noted "first un," presumably first union, in the corner of Fawkes' application. Gabel testified that Fawkes was the first applicant that tried to talk about the union. Gabel testified that he "just danced around" the subject. Fawkes was the first Radisson employee-applicant that Gabel interviewed. Notwithstanding, the "first un" comment, Gabel recommended Fawkes for hire. Gabel testified that he did not know why Fawkes was not hired and that L'Hommedieu or Tidd must have rejected Fawkes. Accord-

¹² Tidd did not testify at the hearing. Because there was no explanation for the failure to call him, I have drawn an adverse inference from the failure of Tidd to testify. *Property Resources Corp.*, 285 NLRB 1105 fn. 2 (1987); *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988).

¹³ Respondent produced interview evaluation forms filled out by Gabel and Tidd. No forms filled out by L'Hommedieu were produced. I draw the inference that L'Hommedieu who interviewed with Tidd did not fill out any forms.

¹⁴Respondent's records show that Barela was recommended for hire in February and March 1995. In those evaluations Barela was rated as well versed in skills and as requiring little training. Respondent's defense is that once having been rejected for hire, Barela was no longer eligible for employment.

ing to L'Hommedieu, Tidd rejected Fawkes because the employee had a certificate in heating, ventilation, and air conditioning but was not working in the trade. 15 Gabel did not agree with this reasoning and at the trial admitted that he would still hire Fawkes. Tidd did not testify to explain this failure to hire. I further note that Marshall had recommended Fawkes to Gabel. I find no credible explanation for the refusal to hire Fawkes.

Employee A. J. Hamlin worked at the hotel from 1964 to the takeover. At the time of the takeover, Hamlin was a licensed stationary engineer. In addition, Hamlin was a union steward. Hamlin was first interviewed by Respondent on January 5. Gabel told Hamlin that Respondent's dress code did not allow beards and Hamlin answered that he would have no problem with the dress code. Gabel told Hamlin that he expected that Respondent's stationary engineers would perform some shopwork. Hamlin said that as long as he could perform the work in the boiler room he would have no problem performing such work. Under city regulations, a stationary operator must remain near the boiler room controls.

Gabel testified that Hamlin had a poor attitude about additional work other than operating but was willing. Gabel testified that Hamlin said he was willing to take on additional work but that Gabel did not believe him. Most important, Gabel wrote that Hamlin was not as good as an applicant identified as "Ed." Gabel testified that "Ed" was employee Ed Nazarenus, whom Gabel did recommend for hire. L'Hommedieu also testified that Hamlin had a poor attitude. Tidd was present at the same interview as L'Hommedieu but made no comment about an alleged bad attitude on the evaluation form he filed out. I give no weight to the testimony of L'Hommedieu or the comments of Tidd. However, Gabel's comment that Hamlin was not as good as Ed is taken at face value.

As indicated earlier Plant attempted to hire Hamlin in May but was informed by Soroka and Rosas that Hamlin could not be hired. As discussed in more detail below, I draw the same conclusion, that Plant reached, i.e., that Hamlin would not be hired because the Union had brought charges against Respondent for not hiring its members.

Employee Ronald Maes worked at the hotel from May 1989 until the takeover. Maes worked as a maintenance engineer and painter. Maes testified that he told the interviewers that he could work with or without a union. L'Hommedieu first testified that Maes was less qualified than what Respondent was looking for. 16 Later, L'Hommedieu shifted his reasons and testified that Maes was an average guy who restricted the shift he would work. Tidd's comments state, "Painter, tile, vinyl, carpentry—Has HVAC certificate '87—does not practice trade. Fills in on room calls. Prefers day shift, hesitant to commit to other shifts unless due to emergencies." Gabel rated Maes as average and stated that Maes had a "good attitude." However, Gabel did not recommend Maes for hire.

Respondent claims it did not hire Jerry Manion based on a negative recommendation from Henning Svendson. First, I do not credit L'Hommedieu's uncorroborated testimony that Svendson recommended that he not hire Manion. L'Hommedieu did not mention this alleged negative recommendation in his affidavit to the Board's Regional Office dated March 2, 1995. Surely L'Hommedieu would have included this information in his affidavit had it actually occurred. See Lowe Paper Co., 302 NLRB 622, 623 (1991). L'Hommedieu testified that he was an incessant notetaker. However, he did not have any notes of his alleged conversation with Svendson. I am inclined to find that the alleged conversation with Svendson was a recent fabrication designed to bolster Respondent's defense after L'Hommedieu heard Marshall's testimony. Second, Gabel and Tidd, the two engineers recommended Manion for hire. Gabel, notwithstanding his remarks to Marshall regarding Manion's union support, gave Manion a recommendation for hire.¹⁷ At the hearing, Gabel admitted that he did not know why Manion was not hired. L'Hommedieu testified that he was the "no" vote and that he did not tell Gabel and Tidd about Svendson's alleged negative recommendation. Thus, I find no credible explanation for the failure to hire Manion.

Employee Ed Nazarenus worked as a boiler operator or stationary engineer from 1986 to the takeover. Gabel rated Nazarenus as "Superior" and recommended him for hire. Tidd's comments were complimentary, "Previous experience with Hilton (16 years) as general maintenance, joined Radisson in '86 as Stationary Engineer, includes boilers and chillers. Knows systems and pneumatics." Gabel was unable to testify as to why Nazarenus was not hired. L'Hommedieu testified that Nazarenus was unwilling and didn't have the desire to perform work other than boiler operator. I do not credit this testimony. L'Hommedieu's testimony was not corroborated by Tidd, Gabel or any documentary evidence. Had Nazarenus been unwilling to perform other work such an attitude would have been noted by Tidd who was present at the interview. I find it highly suspicious that L'Hommedieu would reject an employee rated superior by Gabel.

Employee Richard Palmquist worked at the hotel from May 1989 until January 10, 1995, as a maintenance engineer. Gabel rated Palmquist as "Above Average" and recommended him for hire. Gabel testified that he really wanted Palmquist because of Palmquist's skills in laundry maintenance. At the hearing, Gabel still indicated a desire to hire Palmquist. Tidd's evaluation did not reject Palmquist. L'Hommedieu testified that Palmquist did not have pneumatic skills but that did not eliminate Palmquist as a hire. Without any testimony from Tidd, a credible explanation for the failure to hire Palmquist does not exist.

Employee Frank Pinkett was recommended for hire by both Svendson and Marshall. Gabel testified that Pinkett had worked as a handy man for 30 years and if he hadn't advanced in 30 years, there was no reason to believe he would advance with Respondent. Gabel also testified that Pinkett was a poor interview. L'Hommedieu testified that Pinkett

¹⁵L'Hommedieu testified that Fawkes stated that he was not a member of the Union. I do not credit this testimony. L'Hommedieu produced no notes from this meeting and apparently filled out no job interview form. Absent corroboration, I do not credit his testimony regarding interviews with employees.

¹⁶L'Hommedieu hired at least two employees who were less qualified than Maes.

¹⁷ It should be noted that while Gabel told Marshall that Manion was too heavily involved in the Union, Gabel still recommended that Manion be hired. It was L'Hommedieu, based on reasons not known even by Gabel and Tidd who blackballed Manion. I find these reasons were union related and not the recently fabricated conversation with Svendson

was a nice man but that he had limited skills. In his pretrial affidavit, L'Hommedieu stated that Pinkett was not hired because Pinkett wanted to be a wallpaper hanger. Based on Gabel's failure to recommend Pinkett for hire, I believe Pinkett would not have been hired in any event. Gabel recommended most of the alleged discriminatees for hire including Manion who he described as too strong a union supporter. Based on the record as a whole, I believe Gabel's recommendations for hire, as opposed to those of L'Hommedieu and Tidd, were unaffected by union considerations. 18 Thus, here I find Pinkett would not have been hired in any event.

Respondent allegedly did not hire employee Richard Romero Sr. because of a negative recommendation from Svendson. I do not credit L'Hommedieu's uncorroborated testimony that Svendson told him not to hire Manion and Romero or that Manion and Romero were bad folks. Both Gabel and Tidd recommended Romero for hire. It was only L'Hommedieu that blackballed Romero. L'Hommedieu contended that Romero had a bad attitude but could only point to Svendson's alleged recommendation. Gabel had concluded that Romero had a good attitude. As noted earlier, L'Hommedieu did not mention Svendson's remarks in his pretrial affidavit. Again, I find no credible explanation for the failure to hire Romero.

Employee Robert Schlauder worked at the hotel from June 1989 until the takeover. Schlauder worked from midnight until 8 a.m. According to Schlauder, at the end of his interview, Gabel said that if it was up to him, Schlauder would be hired. 19 Schlauder next interviewed with Tidd and L'Hommedieu. According to Schlauder, he asked if the hotel was going to be union or not. Tidd answered that there was no need for a third party. Schlauder asked if by third party Tidd meant a union, Tidd said yes and L'Hommedieu answered no. Schlauder then stated that he did not like being lied to. Tidd answered that he did not like being called a liar. Thereafter a heated discussion took place between Schlauder, Tidd, and L'Hommedieu.

Gabel testified that he did not recommend Schlauder for hire because the employee had a bad attitude and the hotel did not need welding and metal working skills. L'Hommedieu testified that Schlauder had a chip on his shoulder and was more interested in creating difficulties than in finding a job. Here, I find that Respondent would not have hired Schlauder in any event because of what it deemed to be a poor attitude. Gabel did not recommend Schlauder for hire. Further, Respondent would have not hired Schlauder based on his having called Tidd and L'Hommedieu liars. I do not find the fact that Tidd and L'Hommedieu gave different answers to the question of whether Tidd meant the union when he mentioned a third party elevated Schlauder's conduct to the level of protected concerted activity.²⁰

Employee Daniel Sowell worked at the hotel from December 1983 until the takeover. Gabel rated Sowell as "Average" and recommended him for hire. Gabel admitted that he did not know why Sowell was not hired. Tidd's comments indicate, "Temp. Control Mechanic, can handle some maintenance, will chip in to do cosmetic repairs if not too delicate. No restrictions on time." L'Hommedieu, however, testified that Sowell was not hired because he was just average, not different from a lot of others. L'Hommedieu ignored Sowell's experience yet hired at least two employees with far less experience. Again, I am very suspicious where L'Hommedieu blackballed an employee who was acceptable to Respondent's two technical experts.

Employee Michael Walker worked at the hotel from July 1994 until the takeover by Respondent. Gabel rated Walker average but recommended him for hire and commented, "7 mts on job. 12-8 paint vinyl. Wants own business. Good self starter & attitude. This is hard slot to fill." At the time of the hearing, Gabel still wanted to hire Walker. L'Hommedieu testified that Walker was not hired because he had a limited mechanical experience and because he wanted a specific shift. I find that unconvincing because Gabel, the technical person, wanted Walker for a slot not requiring mechanical skills and Gabel specifically wanted Walker for the graveyard shift. Again, L'Hommedieu went against the technical expert for reasons which do not withstand scrutiny. I do not accept Respondent's position that Tidd rejected Walker because the employee preferred the graveyard shift.

III. ANALYSIS AND CONCLUSIONS

A. The Failure to Hire

The General Counsel alleges that Respondent failed to consider for employment or to hire the former Radisson employees because of their affiliation with the Union and in order to avoid a successorship obligation.

An employer has no obligation to hire all or any of the employees of a predecessor employer. *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 261–262 (1974); *NLRB v. Burns International Security Service Inc.*, 406 U.S. 272, 280–281 (1972). However, a new owner cannot refuse to hire the employees of a predecessor because those employees are affiliated with and represented by a union or in order to avoid having to recognize and bargain with a union. An employer's refusal to hire for such reasons constitutes discrimination in violation of Section 8(a)(3) and (1) of the Act. *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981), enfg. as modified 245 NLRB 78 (1981); *Packing House & Industrial Services, Inc. v. NLRB*, 590 F.2d 688 (8th Cir. 1978), enfg. as modified 231 NLRB 735 (1977).

In Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the

 $^{^{18}\,\}mathrm{As}$ noted earlier, Gabel recommended Zarlengo for hire even though the electrician was a union steward.

¹⁹I do not credit Schlauder's testimony that Gabel said he would hire Schlauder. Gabel knew the employee could be rejected by either Tidd or L'Hommedieu. Under such circumstances, I do not believe Gabel would make such a remark.

²⁰ In deciding that Schlauder was not engaged in protected activity when he called Tidd and L'Hommedieu liars, I considered the following factors; the place of the discussion, the subject matter of the discussion, the nature of the employee's outburst, and whether the

outburst was, in any way, provoked by the employer's unfair labor practices. See *Postal Service*, 268 NLRB 274 (1983).

Here, Schlauder's outburst took place in the context of a job interview, not in a grievance meeting or negotiation. Schlauder did ask a question about unions but Tidd answered by giving a lawful opinion. Schlauder reacted in an offensive manner without provocation. This occurred in an interview setting where such conduct would normally not be expected or tolerated. I find that it would be reasonable for Respondent to reject an applicant who was rude in an employment interview

Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's Wright Line test in NLRB v. Transportation Corp., 462 U.S. 393, 399-403 (1983). In Manno Electric, Inc., 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows: The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

As the Board stated in *U.S. Marine Corp.*, 293 NLRB 699 at 670 (1989):

The Board has held that the following factors are among those that establish that a new owner has violated Section 8(a)(3) in refusing to hire employees of the predecessor: substantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine.

It is unquestioned that the General Counsel must establish unlawful motive or union animus as part of his prima facie case. If the unlawful purpose is not present or implied, the employer's conduct does not violate the Act. Abbey Island Park Manor, 267 NLRB 163 (1983); Howard Johnson Co., 209 NLRB 1122 (1974). However, direct evidence of union animus is not necessary to support a finding of discrimination. The motive may be inferred from the totality of the circumstances proved. Fluor Daniel, Inc., 311 NLRB 498 (1993); Associacion Hospital del Maestro, 291 NLRB 198, 204 (1988).

I find strong evidence of union animus present in this case. First, the statements made by Gabel to Marshall that Manion was too heavily involved with the Union and that Zarlengo would not make the list because he was the union steward, indicate that Respondent's hiring decisions were influenced by union considerations. Further, Gabel stated that he didn't believe that the engineering employees should work in a union situation and that Respondent hoped to operate the hotel nonunion. Thereafter, Gabel asked for the names of stationary engineers or watch engineers who were not likely to be strong supporters of the Union. Marshall gave Gabel two names and those two employees were hired.

Second, the statements made by L'Hommedieu to Goldberg are strong admissions that Respondent was seeking to avoid hiring a majority of the union employees. L'Hommedieu told Goldberg that if Respondent hired only a minimal number of Radisson employees, Respondent would

not have to honor the union contract. L'Hommedieu stated that Respondent had interviewed the maintenance employees and retained only the least prounion employees. Goldberg was also told that he could not hire any recently terminated Radisson employees. Not only do L'Hommedieu's statements establish that Respondent was seeking to avoid hiring union members but they also constitute an outright confession that he was attempting to avoid any obligation to the Union under the successorship doctrine. *American Petrofina Co. of Texas*, 247 NLRB 183 (1980). Further, Soroka told Goldberg that Goldberg could not hire an employee because that employee might be prounion.

As stated earlier, Respondent was unable to offer a credible reason for the failure to hire the seven employees recommended for hire by Gabel. Further, Respondent was unable to offer a credible defense for the failure to hire Barela. I have drawn the inference that the reason these eight employees were not hired was that L'Hommedieu, as he told Goldberg, was seeking to avoid any obligation to the Union. As mentioned above, I found instances, where L'Hommedieu blackballed employees who had been recommended for hire by Gabel and Tidd, the two building services experts. I could only infer from L'Hommedieu's statements and conduct that he was intent on precluding the former Radisson employees from being hired as a majority of Respondent's building services department to avoid any successorship obligation.

The burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. As stated earlier, only 3 of the 15 bargaining unit employees were hired. While Respondent has established that the hotel was in poor physical condition under its predecessor's operation, it does not follow that Respondent has established a defense for its actions. An employer cannot carry its burden of persuasion simply by showing that it had a legitimate reason for its action, but must show by a preponderance of the evidence that the action would have been taken in the absence of protected conduct. *T&J Trucking Co.*, 316 NLRB 771 (1995).

First Respondent hired Leo Wasserman, an unsuccessful supervisor from the Radisson's engineering department to work in a construction department. Further, Gabel testified that he could have worked with Marshall. Gabel testified that Goldberg was hired over Marshall simply because Goldberg was more experienced. Most important, Goldberg who supervised the building department from the time of the takeover until May 1995, was told that the prior operators had not been willing to spend money to maintain the hotel. Goldberg was not informed of any vandalism or theft problems. Avoiding the union contract was the reason given to Goldberg for the hiring of only three Radisson employees at the time of the takeover. Thereafter, Goldberg was not permitted to hire an employee because the employee might be prounion. Respondent failed to show that any of the employees were even suspected of engaging in vandalism or theft. Even after the Union had filed a charge against Respondent, Supervisor Plant was not told that the fear of vandalism or theft was a reason for not hiring Hamlin.

Of the 12 employees at issue, Gabel recommended the hire of seven, Fawkes, Manion, Nazarenus, Palmquist, Romero, Sowell, and Walker. Further no explanation for the failure to hire Barela was offered. As will be seen below, in May, Hamlin was denied employment because the Union had filed

a charge with the Board. Gabel offered a defense for the failure to hire four employees, Hamlin, Maes, Schlauder, and Pinkett. I believe that Gabel's recommendations were not affected by union consideration.

In sum, I find that Respondent failed to hire Fawkes, Barela, Manion, Nazarenus, Palmquist, Romero, Sowell, and Walker because it was seeking to avoid a successorship obligation of recognizing any bargaining with the Union. I find a lack of credible evidence that Respondent refused to hire any employee because of the alleged fear of theft or vandalism.

B. The 8(a)(4) Violation

In May, A. J. Hamlin went to see Joseph Plant, Respondent director of building services and then Respondent's plant manager, about a temporary opening as a boiler operator. Plant told Hamlin that one of the stationary engineers had been in a motorcycle accident and that Plant did not know if the employee was going to return to work. Plant told Hamlin to call the personnel office the next day. Hamlin called personnel for the next few days. After not being able to reach Janet Waites, Hamlin called Plant. Plant said that Roger Rosas, told Waites not to hire Hamlin. Plant then said he would speak with Rosas. Plant, asked whether Hamlin was still in the Union. Hamlin replied that he didn't know whether he was still a union member. Plant, asked whether Hamlin was willing to change his hair style. Hamlin responded "Hey man, I know what it is all about. It is all about the Union." Plant responded, "Well I can't say anything about that because I might lose my job."

Plant, testified that after recommending that Hamlin be hired, he learned during a meeting with Soroka and Rosas, that Hamlin would not be hired as a boiler operator. Plant admitted that during the meeting, Soroka read aloud from the charge which made allegations that Respondent was discriminating against employees because they were members of the Union. Plant testified that he inferred from Soroka's reading of the letter that Hamlin would not be hired. Based on Plant's testimony, the General Counsel alleged that Respondent refused to hire Hamlin in violation of Section 8(a)(4).

Section 8(a)(4) prohibits an employer from discharging or otherwise discriminating against an employee for filing charges or giving testimony under the Act. The approach to Section 8(a)(4) has generally been a liberal one and the Board has included job applicants within the protection of Section 8(a)(4). *General Services*, 229 NLRB 940 (1977).

Essentially, the elements of a discriminatory refusal to hire case are the employment application, the refusal to hire each, a showing that each was expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus. *Big E's Foodland*, 242 NLRB 963, 968 (1979).

The credible evidence shows that Plant recommended Hamlin for hire and that Soroka rejected Hamlin's employment because the Union had filed a charge. Soroka made no mention of alleged vandalism or theft by former Radisson employees to Plant. Soroka, however, did read the charge to Plant. Further, Plant did not deny Hamlin's allegation that the denial of employment was "all about the Union." Plant's testimony and his statements to Hamlin, coupled with the discrimination in the initial hiring, establish a strong case

that Respondent refused to hire Hamlin because the Union had filed its charge against Respondent. The burden would shift to Respondent to establish that the same action would have taken place in the absence of the employee's protected conduct. However, Respondent has given no credible reason for not hiring Hamlin pursuant to Plant's recommendation. Respondent's defense that former Radisson employees could not be hired because of the fear of vandalism and theft is rejected since Soroka mentioned no such thing to Plant. I conclude that absent discrimination Hamlin would have been hired.

Respondent argued that this new allegation was untimely filed and, therefore, barred by Section 10(b) of the Act. Applying the principles of Fant Milling, and Nickles Bakery, supra, I find the 8(a)(4) allegation is closely related to and grew out of the original 8(a)(3) charge. Both allegations arise out of the same set of facts and sequence of events; the failure to hire the former Radisson employees represented by the Union. The failure to hire Hamlin was placed in issue by the original charge and the amendment merely added an additional related unlawful motive for the refusal to hire Hamlin. This amendment was based on the testimony of one of Respondent's own witnesses. In defending the refusal to hire Hamlin, Plant gave the testimony which led to the amendment of the complaint. Therefore, I find the 8(a)(4) allegation is closely related to the original charge. Nephi Rubber Products, 303 NLRB 151 (1991), enfd. 976 F.2d 1461 (10th Cir. 1992): Pergament United Sales, Inc., 296 NLRB 333 (1989). enfd. 920 F.2d 130 (2d Cir. 1990). Accordingly, I find that the 8(a)(4) allegation is not barred by Section 10(b) of the Act.

C. Interrogation

An employer violates Section 8(a)(1) of the Act by interrogating employees about their union activities or that of other employees under coercive circumstances. *NLRB v. Prineville Stud Co.*, 578 F.2d 1292 (9th Cir. 1978); *Bremol Electric, Inc.*, 271 NLRB 1557 (1984); *Pacemaker Driver Services*, 269 NLRB 971, 977–978 (1984). In analyzing the alleged interrogation I have looked at the following factors: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of the interrogation. See *Sunnyvale Medical Center*, 277 NLRB 1217 (1985).

As discussed above, I have found no credible evidence that Gabel asked job applicants Richard Romero or A. J. Hamlin about their union affiliations.

Dwight Barela testified that in a interview in March 1995 he was asked by an employee in personnel, whether he was in the Union. Barela answered that he was. First, I note that this questioning took place in the context of a job interview. The Board has recognized that an applicant may fear that any answer he might give to questions about union sentiments during a job interview may well affect his job prospects. See Lassen Community Hospital, 278 NLRB 370, 374 (1986). Since Barela was no longer employed under a union contract, the answer to the question was not obvious. Further, Respondent had earlier engaged in hiring practices designed to avoid hiring union members as a majority of its work force. I find that Respondent's interrogation of Barela violated Section 8(a)(1) of the Act.

In May, Plant, asked whether Hamlin was still in the Union. Hamlin replied that he didn't know whether he was still a union member. Plant, asked whether Hamlin was willing to change his hair style. Hamlin responded, "Hey man, I know what it is all about. It is all about the Union." Plant responded, "Well I can't say anything about that because I might lose my job."

The questioning of Hamlin by Plant is clearly coercive. Hamlin and Plant were in the process of attempting to get the hiring of Hamlin approved by the Respondent's personnel office. In the context of Hamlin's rejection by the personnel department over Plant's recommendation, Plant raised the subject of the Union. Since Hamlin had been unemployed, his membership in the Union was not clear. Finally, Plant's remark that he could not respond to Hamlin's allegation that the refusal to hire Hamlin was union related, implies that Respondent did hold union membership against employees. Thus, the questioning of Hamlin would lead to an inference that union activities were held against employee applicants. Therefore, I find Respondent's interrogation of Hamlin violated Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Accordingly, Respondent will be ordered to offer Jonathan Fawkes, Dwight Barela, Jerry Manion, Ed Nazarenus, Richard Palmquist, Richard Romero Sr., Daniel Sowell, Michael Walker, and A. J. Hamlin immediate reinstatement to the positions from which they were unlawfully excluded from employment, dismissing, if necessary, anyone who may have been hired or assigned to perform the work they would have been performing if they had not been unlawfully denied employment, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. Additionally Respondent shall be required to make the employees whole for any loss of earnings they may have suffered by reason of the discrimination against them, with backpay to be computed on a quarterly basis, making deductions for interim earnings, F. W. Woolworth Co., 90 NLRB 289 (1950), and with interest to be provided in the manner prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987).

CONCLUSIONS OF LAW

- 1. The Respondent, Seven Seventeen HB Denver Corporation, d/b/a Adam's Mark Hotel, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. The Union, International Union of Operating Engineers, Local 1, is a labor organization within the meaning of the Act
- 3. Respondent has violated Section 8(a)(3) and (1) of the Act by refusing to hire Jonathan "Nick" Fawkes, Dwight Barela, Jerry Manion, Ed Nazarenus, Richard Palmquist, Richard Romero Sr., Daniel Sowell, and Michael Walker because the employees were affiliated with the Union and/or in order to avoid having to recognize and bargain with the Union.

- 4. Respondent has violated Section 8(a)(4) and (1) of the act by refusing to hire A. J. Hamlin because the Union had filed charges against Respondent with the Board.
- 5. Respondent has violated Section 8(a)(1) of the Act by interrogating employee-applicants about their union membership.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²¹

ORDER

The Respondent, Seven Seventeen HB Denver Corporation, d/b/a/ Adam's Mark Hotel, Denver Colorado, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Refusing to consider for employment and/or refusing to hire employees because of their affiliation with a labor organization or in order to avoid having to recognize and bargain with International Union of Operating Engineers, Local 1.
- (b) Refusing to hire employees because the employees or their union have filed charges with the Board.
- (c) Interrogating employee applicants about their union membership or union sentiments.
- (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order, offer Jonathan "Nick" Fawkes, Dwight Barela, Jerry Manion, Ed Nazarenus, Richard Palmquist, Richard Romero Sr., Daniel Sowell, Michael Walker, and A. J. Hamlin full reinstatement to the job for which they would have been hired or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to the seniority or any other rights or privileges they would have enjoyed had they been hired.
- (b) Make whole Fawkes, Barela, Manion, Nazarenus, Palmquist, Romero, Sowell, Walker, and Hamlin for any and all losses incurred as a result of Respondent's unlawful discrimination against them, with interest, as provided in the remedy section of this decision.
- (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to hire, and within 3 days thereafter notify Fawkes, Barela, Manion, Nazarenus, Palmquist, Romero, Sowell, Walker, and Hamlin in writing that this has been done and that the discipline found unlawful herein will not be used against them in any
- (d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (e) Within 14 days after service by the Regional Director, post at its Denver, Colorado facilities copies, in English and

²¹ All motions inconsistent with this recommended Order are hereby denied. In the event no exceptions are as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Spanish, of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since January 10, 1995.

(f) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize To form, join, or assist any union To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to hire or consider for employment prospective employees because they are affiliated with International Union of Operating Engineers, Local 1 or any other union or to avoid an obligation to recognize and bargain with any union.

WE WILL NOT refuse to hire employees because they or their union filed charges with the Board.

WE WILL NOT interrogate employee-applicants about their union membership or union sentiments.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in any of your rights set forth above which are guaranteed by the National Labor Relations Act.

WE WILL offer Jonathan "Nick" Fawkes, Dwight Barela, Jerry Manion, Ed Nazarenus, Richard Palmquist, Richard Romero Sr., Daniel Sowell, Michael Walker, and A. J. Hamlin immediate and full reinstatement to the positions that they would have occupied if they had not been unlawfully denied employment, dismissing, if necessary, anyone who may have been hired or assigned to perform the work that they would have been performing, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of pay they may have suffered as a result of the unlawful denial of employment to them, with interest on the amount owing.

WE WILL remove from their files any reference to the unlawful refusal to employ Fawkes, Barela, Manion, Nazarenus, Palmquist, Romero, Sowell, Walker, and Hamlin and notify them in writing that this has been done and that these personnel actions will not be used against them in any way.

SEVEN SEVENTEEN HB DENVER CORPORA-TION, D/B/A ADAM'S MARK HOTEL

²² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."